Binding Arbitration and the Nondelegation Doctrine: Does Ohio's Collective Bargaining Act Unconstitutionally Delegate Legislative Authority to Administratively Appointed Arbitrators?

I. INTRODUCTION

On May 10, 1989, the Ohio Supreme Court handed down *City of Rocky River v. State Employment Relations Board*,[1] holding binding arbitration under section 4117.14(I) of the Ohio Revised Code to be a constitutional delegation of legislative authority and not violative of home rule powers granted to municipalities by the Ohio Constitution.[2] The 4-3 split decision ended a lengthy legal battle between the city of Rocky River and the union representative of the Rocky River Firefighters, Local 695, and, at least temporarily, settled a constitutional debate among the justices of the Ohio Supreme Court.[3]

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1. 43 Ohio St. 3d 1, 539 N.E.2d 103 (1989) [hereinafter *Rocky IV*].

2. Home rule provisions are frequently found in state constitutions and have the effect of reserving strictly local issues for municipal entities to resolve. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C.L. REV. 557, 563 (1980).

3. After the Public Employees' Collective Bargaining Act [hereinafter Act] took effect in April, 1984, the city of Rocky River [hereinafter City] recognized the Rocky River Firefighters, Local 695 [hereinafter Union], as the firefighters' exclusive representative and commenced negotiations with the Union toward the establishment of an initial collective bargaining agreement. *Rocky IV*, 43 Ohio St. 3d 1, 2, 539 N.E.2d 103, 104 (1989). Failing to reach an agreement on various matters, the parties presented their positions to a mediator, and subsequently appeared before a fact-finding panel, as provided in the Act. At that hearing, the panel found for the City on all contended issues except wages, on which the panel opted for the Union's proposal. This prompted the City to reject the panel's recommendation, thereby invoking the binding arbitration requirements of § 4117.14(D)(1). *Id.* at 2-3, 539 N.E.2d at 104-05.

Immediately following an adverse hearing before an arbitrator, the City initiated a declaratory action in the court of common pleas based on its belief that the binding arbitration mandated in § 4117.14(I) of the Act violated both the state and federal constitutions. The lower court granted the Union's motion for summary judgment and the court of appeals affirmed. *Id.* at 3, 539 N.E.2d at 105. Nonetheless, the Ohio Supreme Court narrowly reversed the court of appeals and held § 4117.14(I) to be unconstitutional insofar as it (1) unlawfully delegated legislative authority to an arbitrator, and (2) interfered with a municipality's constitutional right to govern its internal affairs. City of Rocky River v. State Employment Relations Bd., 39 Ohio St. 3d 196, 530 N.E.2d 1 (1988)[hereinafter *Rocky I*].

Rocky II represented the Ohio Supreme Court's response to multiple motions for "rehearing and/or clarification." City of Rocky River v. State Employment Relations Bd., 40 Ohio St. 3d 606, 533 N.E.2d 270 (1988) [hereinafter *Rocky II*]. In that decision, the court clarified portions of its *Rocky I* opinion, but otherwise denied the motions for rehearing. However, after Justice Resnick replaced retiring Justice Locher on the bench, the court granted the Union's motion for

Notwithstanding his thorough refutation of the city's home rule argument,[4] Justice Douglas passed quickly upon the delegation issue and made little effort to explain the inapplicability of the "nondelegation" doctrine.[5] Instead, he summarily found the arbitration contemplated by section 4117.14(I) to be lawful since the overall scheme contained sufficient procedural protections and allowed for meaningful judicial review.[6]

This Comment seeks to more thoroughly develop, and ultimately resolve, the delegation question raised by section 4117.14(I) by surveying the pertinent decisions of other state supreme courts, as well as the explanations presented in a number of secondary sources. Part II of this Comment provides an overview of the Public Employee's Collective Bargaining Act to reveal the operation and significance of binding arbitration in Ohio's new collective bargaining statute. Part III examines the factors that have influenced courts and commentators in their constitutional review of various binding arbitration legislation, focusing on the question of whether arbitrators impermissibly

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"reconsideration of the denial of the motion for rehearing." City of Rocky River v. State Employment Relations Bd., 41 Ohio St. 3d 602, 535 N.E.2d 657 (1989) [hereinafter *Rocky III*]. Upon further consideration of the briefs before it, the Ohio Supreme Court, in *Rocky IV*, found the binding mandate of § 4117.14(I) adequate to withstand the City's constitutional challenges. *Rocky IV*, 43 Ohio St. 3d 1, 20, 539 N.E.2d 103, 119-20 (1989).

4. Justice Douglas examined the constitutional debates that preceded the enactment of § 34, article II of the Ohio Constitution and ultimately concluded that the section superseded the home rule provisions of §§ 3 and 7 of article XVIII where the provisions conflicted. Accordingly, as the Public Employees' Collective Bargaining Act, with its component binding arbitration scheme set forth in § 4117.14(I), fell within the ambit of § 34 of article II, home rule reservations of local authority could not preclude binding arbitration between public employers and the exclusive representative of local safety forces. *Rocky IV*, 43 Ohio St. 3d 1, 12-18, 539 N.E.2d 103, 113-18 (1989).

5. The nondelegation doctrine "seeks to safeguard against excessive delegation and misuse or abuse of delegated law-making power." City of Detroit v. Detroit Police Officers, 408 Mich. 410, 513, 294 N.W.2d 68, 110 (1980) (Levin, J., dissenting), *appeal dismissed*, 450 U.S. 903 (1981). Professor Staudohar describes the doctrine as having its roots in the concept of sovereignty, but questions the notion that the sovereign should avoid delegating its decision-making power. Staudohar, *Constitutionality of Compulsory Arbitration Statutes in Public Employment*, 27 LAB. L.J. 670 (1976). Professor Westbrook cites "[s]eparation of powers, the common-law maxim against subdelegation, due process, and the principle of constitutional supremacy" as possible bases of the doctrine. Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law: Lessons from Cases That Have Perpetuated an Anachronism*, 30 ST. LOUIS U.L.J. 331, 334 (1986).

Apparently, terse applications of the nondelegation doctrine are not uncommon. Professor Westbrook notes that courts that have upheld binding arbitration schemes either avoid the nondelegation issue altogether, or mention it only briefly. *Id.* at 358.

6. *Rocky IV*, 43 Ohio St. 3d 1, 12, 539 N.E.2d 103, 112-13 (1989).

perform legislative duties.[7] Finally, Part IV applies the constitutional determinants offered by the above authorities to Ohio's bargaining statute and concludes that its compulsory arbitration provisions lawfully delegate authority to administratively appointed arbitrators.

II. OHIO'S PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT

Ohio became the thirty-eighth state to adopt public sector collective bargaining legislation when Ohio Governor Richard Celeste signed Senate Bill 133, the Public Employee's Collective Bargaining Act, into law on July 6, 1983.[8] The Act represents a strong piece of legislation that various unions and interest groups had been encouraging for over two decades.[9] As an indication of its vigor, section 4117.22 of the Ohio Revised Code dictates that the Act "shall be construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees."[10]

The cornerstone of the Act lies in its establishment of the State Employment Relations Board (SERB), an administrative body composed of three individuals, appointed by the Governor, to oversee the operation of the Act.[11] Under the Act, SERB is empowered to: (1) appoint various subordinate officials, mediators, fact-finders, arbitrators, and other employees; (2) hold hearings as provided by the Act; (3) maintain lists of interested public employers and employee organizations; (4) designate appropriate bargaining units; (5) conduct certification elections; and (6) monitor the state personnel board of review.[12] Most significantly, the Act recognizes the right of public employees to engage in concerted activities and bargain collectively

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7. The exclusion of state and local governments from the reaches of the National Labor Relations Act has meant that the principles governing state and local employee relations largely derive from state legislation and state case law. Westbrook, *supra* note 5, at 340. Moreover, delegations of congressional authority seemingly generate little litigation at the federal level, whereas state court challenges are commonplace. *Id.* at 362. For these reasons, this Comment will focus on state statutes and decisions and will avoid constructing federal analogies.

8. White, Kaplan & Hawkins, *Ohio's Public Employee Bargaining Law: Can it Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1, 4 (1984).

9. *Id.* at 2-4.

10. Rebecca White and her co-authors consider the Ohio Act one of the nation's strongest pieces of employee bargaining legislation given that it extends to virtually all public employers and employees and that it grants public employees a number of rights, including the right to unionize, the right to bargain collectively, and the right to strike for most employees. *Id.* at 4.

11. OHIO REV. CODE ANN. § 4117.02 (Baldwin Supp. 1989).

12. OHIO REV. CODE ANN. § 4117.02 (Baldwin Supp. 1989).

with their employers over "mandatory subjects of bargaining" (matters pertaining to wages, hours, and other conditions of employment) and requested modifications of an existing collective bargaining agreement.[13] Section 4117.04 affirms these rights by obligating public employers to bargain collectively with the duly-certified exclusive representative (*i.e.*, union) of their employees.

Beyond the mandatory subjects of bargaining and contract negotiations, public employers (although they may elect otherwise) are not compelled to submit to collective bargaining. Section 4117.08(C) recognizes a number of so-called "management rights," which the public employer may exercise unilaterally without consulting the exclusive representative of its employees. Nonetheless, whether a matter constitutes a mandatory subject of bargaining or a right retained by management may not always be readily discernible.[14]

With regard to bargaining agreements effected under its terms, the Act requires the parties to specify a grievance procedure and offers the option of binding arbitration for unresolved grievances. Furthermore, the Act authorizes public employers to deduct dues and other fees from the salaries of union employees, as well as "fair share fees" from non-member employees.[15] Section 4117.11 enumerates various unfair labor practices for public employers and employee organizations (including certified exclusive representatives), which are remediable under section 4117.12.

Finally, at the very heart of the Act, section 4117.14 establishes a detailed system to govern the settlement of negotiation disputes. SERB first appoints a mediator to facilitate contract negotiations if the parties cannot resolve their differences through other means.[16] If an agreement is not reached, SERB is then obligated to appoint a fact-finding panel at least thirty-one days prior to the expiration of the parties' existing agreement.[17] After the panel submits its findings of fact and recommendations, either the legislative arm of the public employer or the members of the certified employee organization, may reject the panel's recommendations; otherwise, the panel's suggestions are incorporated in the parties' successor collective bargaining agreement.[18] Certain employees pursuing the former alternative are then given the right to

13. OHIO REV. CODE ANN. § 4117.03(A) (Baldwin Supp. 1989).

14. White, Kaplan & Hawkins, *supra* note 8, at 7-9.

15. OHIO REV. CODE ANN. § 4117.09 (Baldwin 1983).

16. OHIO REV. CODE ANN. § 4117.14(C)(2) (Baldwin 1983).

17. OHIO REV. CODE ANN. § 4117.14(C)(3) (Baldwin 1983).

18. OHIO REV. CODE ANN. § 4117.14(C)(6) (Baldwin 1983).

strike if they provide adequate notice to their public employer.[19] On the other hand, members of police and fire departments, the state highway patrol, and other safety personnel may not strike and must proceed to binding arbitration ("conciliation" under the Act) as detailed in section 4117.14(G).[20] The subsection at issue in *Rocky IV*, 4117.14(I), enforces awards made pursuant to binding arbitration, stating that "[t]he issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award."

III. The Constitutional Determinants

In exchange for denying safety forces the right to strike, the Act grants them the right to proceed to binding arbitration if their contract negotiations fail.[21] Such a scheme is commonly known as "interest arbitration" and has been offered to similarly indispensable public employees in a number of other states.[22] In spite of its apparent popularity, however, binding interest arbitration has been subject to constitutional attack in virtually every state in which it has been introduced,[23] the most common allegation being that binding arbitration constitutes an unlawful delegation of the state legislature's authority.[24]

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19. Ohio Rev. Code Ann. § 4117.14(D)(2) (Baldwin 1983). Professor Craver notes that strikes are generally confined to the private sector, as most states have outlawed such action by their public employees through legislation or judicial decision. Craver, *supra* note 2, at 557.

20. These employees are granted the right to have their dispute resolved by an impartial arbitrator as a quid pro quo for the prohibition against work stoppages. White, Kaplan & Hawkins, *supra* note 8, at 11. Such schemes have been employed by a number of state legislatures, the appeal being that public employees can maintain their bargaining positions in negotiations while the public is protected from the dangers of a protracted strike. Craver, *supra* note 2, at 558.

21. Ohio Rev. Code Ann. § 4117.14(C) (Baldwin 1983).

22. "Unlike grievance arbitration, which involves the interpretation and application of the terms of an existing contract, interest arbitration asks the arbitrator to engage in the formation of the contract itself. Rather than merely interpreting the contract provisions, the arbitrator is responsible for actually creating the contract." White, Kaplan & Hawkins *supra* note 8, at 11. By 1980, twenty-seven states authorized the use of voluntary or compulsory interest arbitration to resolve bargaining impasses in the public sector. Craver, *supra* note 2, at 558.

23. White, Kaplan & Hawkins, *supra* note 8, at 12 & n.56.

24. Craver, *supra* note 2, at 561. Other constitutional challenges have been predicated on due process, equal protection, the one-man-one-vote doctrine, home rule authorizations, and the governmental power to tax. *Id.* at 561-62.

This charge is based on two considerations. First, the employers in these disputes are governmental entities and, therefore, constitutional concerns almost always arise when their obligations are voluntarily, or statutorily, assigned to third parties.[25] Second, unlike grievance arbitration, interest arbitration essentially asks the arbitrator to create the collective bargaining agreement for the disputing parties. Problems arise in this context as arbitrators traditionally fix the wages, hours, and other working conditions for the parties -- duties traditionally assigned to state legislatures.[26]

In their review of various binding arbitration regimes, courts often seek to determine whether the delegation of power to the arbitrator is "administrative" or "legislative" in nature. Assignments falling in the former category are constitutionally valid, while those falling in the latter are not.[27] Yet, the task before the reviewing court is not merely one of classification; rather, the court must determine "whether there are guarantees against an excessive or unrestrained exercise of [the arbitrator's] power."[28] The Ohio Supreme Court declared:

> [A] statute does not unconstitutionally delegate legislative power if it establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of the discretion can be reviewed effectively. Ordinarily, the establishment of standards can be left to the administrative body or officer if it is reasonable for the General Assembly to defer to the officer's or body's expertise.[29]

Accordingly, Ohio courts must determine whether the statutory policy and standards accompanying such a delegation impress upon the delegatee an "intelligible principle" and whether the discretion accorded the delegatee "can be reviewed effectively."[30] Other state supreme courts have articulated similar constitutional tests and have further considered the presence of proce-

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25. White, Kaplan & Hawkins, *supra* note 8, at 11 & n.55.

26. *Id.*

27. *Id.* at 12. Professor Westbrook points out that such distinctions may not only be difficult to ascertain, but may also not exist at all, with legislation and administration being complementary rather than opposing processes. Westbrook, *supra* note 5, at 361 (citing L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 34 (1965).

28. Milwaukee Co. v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 31, 325 N.W.2d 350, 358 (1982).

29. Blue Cross v. Ratchford, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (1980).

30. *Id.*

dural safeguards and the public accountability of the delegatee.[31] The following sections of this Comment explore these factors, which have seemingly influenced the courts and commentators in their constitutional assessments of various binding arbitration statutes.

A. Standards for the Arbitrator

As a first step in their constitutional inquiries, courts traditionally examine the standards upon which the arbitrator, or arbitration panel, should base its decision.[32] These guidelines usually appear in the granting legislation as a listing of variables for the arbitrator to consider, although some courts have gone so far as to imply standards from the nature of the arbitrator's role, or find sufficient guidance in articulated legislative policies.[33] Regardless of their method of ascertainment, the standards recognized in various jurisdictions differ widely both in their scope and precision. Some states set forth a laundry list of specific factors for the arbitrator; others merely articulate several broad principles.

In upholding the constitutionality of 1969 P.A. 312, as amended in 1972, the Supreme Court of Michigan was convinced that the eight standards set forth in section 9 of the act "significantly channeled" the discretion of the arbitration panel.[34] Representing one of the more elaborate legislative schemes, section 9 provided:

> [T]he arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:
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> (a) The lawful authority of the employer.
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> (b) Stipulations of the parties.
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> (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
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> (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
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> (i) In public employment in comparable communities.
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> (ii) In private employment in comparable communities.
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> (e) The average consumer prices for goods and services, commonly known as the cost of living.

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31. *See* notes 50-91 and accompanying text, *infra*.

32. White, Kaplan & Hawkins, *supra* note 8, at 14.

33. *Id.* at 15. *See* notes 40-44 and accompanying text, *infra*.

34. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 453, 294 N.W.2d 68, 81 (1980).

> (f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
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> (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
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> (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.[35]

Similarly restrictive legislation adopted in several other states has also withstood constitutional attack.[36]

States desiring to preserve a greater degree of discretion in their arbitrators employ less stringent guidelines in their collective bargaining legislation. For example, the Connecticut legislature recommended that the arbitration panel take into account the following considerations, among others, in reaching a decision: "wages, salaries, fringe benefits and working conditions prevailing in the labor market, the ability of the municipal employer to pay, and the interests and welfare of the employees."[37] Significantly, the Supreme Court of Connecticut found these standards adequate in light of accompanying procedural safeguards and "the impracticability of prescribing standards that will precisely govern the outcome of every issue that may arise in contract negotiations . . . ."[38] The highest courts in New York, Pennsylvania, Rhode Island, and Washington upheld comparable legislation.[39]

Finally, where state legislatures failed to provide detailed standards, several courts were willing to read standards into the legislative scheme, uided by the labor market's increased reliance on arbitration or by clear statements of legislative purpose. In *Division 540, Amalgamated Transit*

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35. MICH. COMP. LAWS § 423.239 (1978).

36. *See, e.g.*, Town of Arlington v. Bd. of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); Medford Firefighters Ass'n, Local 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979); Milwaukee Co. v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 325 N.W.2d 350 (1982).

37. CONN. GEN. STAT. ANN. § 7-473c(c)(2) (West 1985).

38. Carofano v. City of Bridgeport, 196 Conn. 623, 635, 495 A.2d 1011, 1017 (1985).

39. City of Amsterdam v. Helsby, 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290 (1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976). *But see* Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980).

Union v. Mercer Co. Improvement Authority,[40] the New Jersey Supreme Court, straining to find guidelines for the arbitrator in the state's collective bargaining act, acknowledged the following "standards and criteria which are inherent" in present-day compulsory arbitration:

> [The arbitrator] must consider the public interest and the impact of his decision on the public welfare. He must act fairly and reasonably to the end that labor peace between the public employer and its employees will be stabilized and promoted. He must make findings which are adequate, and sufficient to support the award.[41]

Accordingly, the court incorporated these "implicit" standards into New Jersey's bargaining act and found the statute at issue to typify a "constitutional expression of legislative policy."[42] In *City of Richfield v. Local No. 1215, International Association of Firefighters*,[43] the Minnesota high court reviewed an act similarly devoid of benchmarks for the arbitrator. Nonetheless, the court upheld the legislation in question because the public policy supporting it supplied adequate guidelines for the arbitration panel and because it would be difficult to formulate rigid standards to govern their decisions.[44]

The state legislatures have expressed noteworthy differences regarding the degree to which they have chosen to direct the decisions of their arbitrators and arbitration panels. Yet, courts almost universally approve of the guidelines set forth in bargaining legislation, most finding the mere listing of such criteria sufficient to pass constitutional muster.[45] This uniformity in result may be the product of several influences. First, courts generally require that the legislative standards embody only a mild degree of precision.

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40. 76 N.J. 245, 386 A.2d 1290 (1978).

41. *Id.* at 252, 386 A.2d at 1294.

42. *Id. See also* Superintending School Comm. of Bangor v. Bangor Educ. Ass'n, 433 A.2d 383, 387 (Me. 1981).

43. 276 N.W.2d 42 (Minn. 1979).

44. *Id.* at 46-47. The *Richfield* court based its decision largely on the following statement of public policy:

> It is the public policy of this state and the purpose of sections 179.61 to 179.77 to promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.

Id. quoting MINN. STAT. § 179.61 (1977).

45. White, Kaplan & Hawkins, *supra* note 8, at 15.

For instance, the Michigan Supreme Court sought "standards at least as reasonably precise as the subject matter requires or permits,"[46] while the Washington Supreme Court merely required "standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it."[47] Second, legislatures implementing collective bargaining legislation in the past decade traditionally detail numerous factors for the arbitrator to consider, perhaps desiring to avoid the constitutional difficulties associated with less definitive standards.[48] Third, the criteria appearing in various bargaining acts may differ only quantitatively, not qualitatively. Professor Craver persuasively argues:

> An examination of the different criteria specified in the various statutes indicates to those familiar with the interest arbitration process the fact that most of the prescribed standards merely codify those factors which seasoned arbiters would likely apply even if no legislative guidelines were provided. This conclusion is substantiated by the fact that experiences with arbitral decisions in Michigan and Pennsylvania have demonstrated no discernible differences between awards governed by detailed statutory standards and those not regulated by any specified criteria.[49]

B. Procedural Safeguards

The foregoing discussion demonstrates that a binding arbitration statute need only provide minimal guidelines to meet the so-called "standards" requirement. Nevertheless, such guidelines alone cannot endure a constitutional challenge; procedural safeguards such as rules governing the selection of arbitrators, timetables for rendering decisions, requirements that opinions be written, and provisions for judicial review may also be necessary to protect against arbitrary action by the arbitrator.[50] The sections which follow

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46. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 461, 294 N.W.2d 68, 86 (1980).

47. City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 463, 553 P.2d 1316, 1319 (1976).

48. White, Kaplan & Hawkins, *supra* note 8, at 14-15.

49. Craver, *supra* note 2, at 567 (footnotes omitted).

50. White, Kaplan & Hawkins, *supra* note 8, at 16-17. "We do not merely focus upon standards, however. Protection against uncontrolled discretionary power can be accomplished by adequate procedural safeguards." Superintending School Comm. of Bangor v. Bangor Educ. Ass'n, 433 A.2d 383, 387 (Me. 1981) (citations omitted). *See also* Dearborn Fire Fighters v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) (two justices find act unconstitutional even though standards sufficient).

outline safeguards deemed most important by courts in their review of various mandatory arbitration schemes.

1. Selecting the Arbitrator.

Closely related to the principle of accountability,[51] discussed later in this Comment, is the process by which an arbitrator, or arbitration panel, is selected to resolve a given impasse in negotiations. Although seldom scrutinized, such procedures are of constitutional significance in that a well-considered selection scheme provides an important protection against abuse and the use of unqualified arbitrators.[52] The Michigan Supreme Court's holding in *City of Detroit* is particularly instructive.[53] In that case, the majority was persuaded that recent amendments to 1976 P.A. 84, a section that had previously troubled the court,[54] had "greatly altered the atmosphere of accountability surrounding the service of arbitration panel chairpersons."[55] Specifically, the state legislature made four noteworthy changes to the original act: (1) it restricted eligibility for appointment as panel chairperson (*i.e.*, arbitrator) to members of a permanent panel established by the Michigan Employment Relations Commission; (2) it added the requirement that the chairperson be a resident of Michigan; (3) it required all members of the permanent panel to qualify by taking an oath or affirmation of office; and (4) it made the term of office of panel members terminable at will.[56] In light of these modifications, the once evenly divided court found sufficient protections in the selection of the chairperson to uphold the constitutionality of the bargaining statute at issue.[57] Outside of Michigan, most selection

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51. *See* notes 77-91 and accompanying text, *infra*.

52. Westbrook, *supra* note 5, at 380.

53. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 294 N.W.2d 68 (1980).

54. *See* Dearborn Fire Fighters v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975).

55. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 469, 294 N.W.2d 68, 89 (1980). Under the former procedure, the public employer and the public employees each selected a delegate to represent their interests on a three-member panel. The third member of the panel, the chairperson or arbitrator, was designated by the parties themselves, or, if the delegates could not agree upon an individual within five (5) days, by the chairman of the mediation board. Also, the chairman of the panel was required to be an "impartial, competent and reputable citizen . . . ." MICH. COMP. LAWS § 423.235 (1969).

56. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 469-71, 294 N.W.2d 68, 89-90.

57. *Id.* at 472-77, 294 N.W.2d 91-94.

procedures have been met with judicial approval, although seemingly few legislatures have provided statutes as thorough as 1976 P.A. 84 in its amended form.[58] Apparently, so long as the procedure provides some assurance that an experienced and attentive arbitrator will preside over the parties' dispute, courts will not invalidate the legislation in question.

2. *The Arbitration Process.*

Beyond providing a sound selection procedure, a collective bargaining statute must adequately protect the due process rights of the disputing parties before, during, and after the hearing before the arbitrator.[59] Moreover, "there must be no bias, favoritism, or substantive unfairness or illegality built into the structure of the mechanism the Legislature chooses."[60] Nonetheless, the various arbitration schemes chosen by the state legislatures have yet to experience serious due process challenges.[61] The following summary is representative of the arbitration procedure currently employed in most jurisdictions and, presumably, is adequately tailored to meet due process and other constitutional demands:

> [The employment relations commission] becomes directly involved upon a petition for mediation-arbitration. It initially investigates and determines whether an actual impasse exists between the parties. The parties also select an impartial arbitrator in a process similar to drawing a jury, by alternatively striking names from a list provided by the [commission]. Initially, the arbitrator must mediate and encourage settlement. Procedures are provided for public hearings and public input. Before proceeding to arbitration the arbitrator must give written notice of intent to resolve the dispute, at which time the parties are entitled to withdraw their final offer. Prior to issuing a decision, either party may request an open meeting where arguments are made in support of their final offers. Finally, the arbitrator is prohibited from making a separate and unsupported decision. Only one of the final offers from the parties may be adopted, in writing, without modification.[62]

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58. *See, e.g.*, City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); State v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

59. City of Amsterdam v. Helsby, 37 N.Y.2d 19, 37, 371 N.Y.S.2d 404, 416, 332 N.E.2d 290, 299 (1975).

60. *Id.*

61. Perhaps this is best explained by the fact that fairness and other due process considerations are the primary objectives of and justifications for arbitration -- a system which seeks to equilibrate the bargaining positions of disputing parties by placing their controversy before an impartial third party.

62. Milwaukee Co. v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 25-26, 325 N.W.2d 350, 355-56 (1982) (summarizing WIS. STAT. § 111.70(4)(CM) 6 (1981)).

While courts generally avoid analyzing arbitration procedures in detail, several tribunals have paid particular attention to the type of arbitration selected by the legislature. In some jurisdictions arbitrators are authorized to formulate any award they feel appropriate; however, most legislatures have opted for "last" or "final" offer arbitration whereby the arbitrator must choose the most reasonable final offer made by one of the parties.[63] With regard to the latter alternative, courts have disputed whether final offer arbitration "significantly circumscribes what might otherwise be deemed a broad delegation of legislative power."[64] In *Carofano v. City of Bridgeport*, the Connecticut Supreme Court answered in the affirmative, holding that the "last best offer" arrangement indicated the legislature's emphasis to "induce settlement of disputes by negotiation under the impetus that the most reasonable proposal would probably gain acceptance by the arbitrators."[65] However, Justice Levin of the Michigan Supreme Court took a contrary position, contending that last offer arbitration aggravated rather than cured the deficiencies of Michigan's collective bargaining statute.[66] He explained:

> Unless one of the last offers coincides with what in the chairman's judgment is the most appropriate award, the last-best-offer feature prevents the process from yielding results reflecting the best public policy, producing instead a result which may arbitrarily assess a penalty on the losing party measured by the difference between the last offer selected and the award the chairman, if not so constrained, would have made. Policy-making power is thus taken from government and conferred upon the parties, the possibility of principled decision-making is reduced, and the risk of non-uniformity is increased.[67]

Hence, although no court would base its determination solely on the mode of arbitration available to disputing parties, the option chosen by the legislature may very well influence the outcome of a constitutional challenge.

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63. Craver, *supra* note 2, at 559-60.

64. Carofano v. City of Bridgeport, 196 Conn. 623, 635, 495 A.2d 1011, 1017 (1985).

65. *Id. See also* City of Detroit v. Detroit Police Officers, 408 Mich. 410, 463-64 n.36, 294 N.W.2d 86, 86-87 n.36 (1980).

66. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 514-15, 294 N.W.2d 68, 111 (Levin, J., dissenting).

67. *Id.*

3. Judicial Review.

Foremost among the procedural safeguards that must accompany a binding arbitration scheme is the opportunity for meaningful judicial review of the arbitrator's decision.[68] Thus, while many collective bargaining statutes suggest that the arbitrator's determination signifies the endpoint of legal proceedings,[69] virtually all jurisdictions recognize at least a limited availability of judicial review, either through legislation or judicial interpretation. Defining the appropriate scope of judicial review, however, presents a rather difficult task with regard to compulsory arbitration. Professor Craver explains:

> If courts narrowly restrict their review function that they effectively provide arbitral determinations with almost total deference, there exists that possibility of catastrophic consequences resulting from an entirely intemperate award. Conversely, if judicial intervention is liberally countenanced, one of the fundamental objectives underlying interest arbitration enactments, the expeditious and final resolution of bargaining disputes, may be substantially compromised. The challenge is to apply standards of review that will discourage frivolous appeals which only delay the impasse resolution process while simultaneously permitting judicial intervention in those occasional situations where corrective action is warranted.[70]

A review of pertinent case law reveals that most courts apply a consistent standard of review to arbitration awards, although they ascribe various titles to their respective procedures.[71] Arbitration decisions tainted by fraud or corruption are uniformly unenforceable if such influences are clearly

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68. Although the grievance arbitrator's discretion is delineated by the terms of the relevant bargaining agreement, the interest arbitrator possesses wide latitude to recommend whatever final resolution seems appropriate. As a result of the discretionary freedom enjoyed by interest arbiters, aberrational decisions may occasionally be produced which reflect neither the desires of the parties nor the realities of the pertinent employment market. To preclude the effectuation of such deviant awards, some meaningful judicial review must be available.

Craver, *supra* note 2, at 571 (footnote omitted). *See also* note 22, *supra*. Professor Craver argues that judicial review, except under certain circumstances, should only be available after the arbitration proceeding has been conducted, as pre-arbitration review could inordinately delay the arbitration process. Craver, *supra* note 2, at 568-70.

69. *E.g.*, OHIO REV. CODE ANN. § 4117.14(I) (Baldwin 1983) ("The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award.").

70. Craver, *supra* note 2, at 572 (footnotes omitted).

71. *Id.* at 573.

demonstrated.[72] Orders that contravene the procedural and substantive standards set out in the enabling legislation, or that require the performance of improper actions, are similarly defective and subject to reversal.[73] Also, if the arbitrator impermissively ignores the guidelines fashioned by the legislature, or interprets them in an obviously inappropriate manner, his award should be vacated.[74] Collective bargaining statutes embracing these grounds for reversal or modification of the arbitrator's ruling have been accorded judicial approval in an overwhelming majority of jurisdictions.[75] Several state supreme courts have even articulated their own standards of review where the statute in question either contained no express review provisions, or was otherwise deficient.[76]

C. Political Accountability.

In addition to examining the standards and procedural safeguards of binding arbitration statutes, courts have considered the degree of political accountability vested in the arbitrator. The issue is rather unique in that most legislative delegations are to administrative agencies or various public servants, whereas, binding arbitration statutes delegate decisional authority to unelected arbitrators.[77] Simply put, the principle of political accountability declares that fundamental policy decisions should be made by individuals and political entities answerable to and elected by the people.[78]

The political accountability issue has generated an interesting variety of judicial opinions among the state courts. The Supreme Court of Rhode Island held that the arbitrator effectively becomes a "public officer" by presiding over public sector labor disputes and that, collectively, these public officers

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72. *Id.* at 573-74.

73. *Id.* at 574-75.

74. *Id.* at 576-77.

75. *See, e.g.*, Carofano v. City of Bridgeport, 196 Conn. 623, 495 A.2d 1011 (1985); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290 (1975); Milwaukee Co. v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 325 N.W.2d 350 (1982).

76. *See, e.g.*, Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978). *But see* White, Kaplan & Hawkins, *supra* note 8, at 17-18.

77. White, Kaplan & Hawkins, *supra* note 8, at 18.

78. Westbrook, *supra* note 5, at 347.

can be viewed as an "administrative agency."[79] Therefore, the state's Firefighters' Arbitration Act was not unconstitutional on the theory that the arbitrators, as private persons, were the improper recipients of legislative authority.[80] Wyoming's Supreme Court issued a similarly creative opinion, contending that binding arbitration did not involve a delegation of power at all since arbitration constitutes an "essential adjunct" to "genuine collective bargaining."[81]

On the other hand, a number of state supreme courts expressly refused to follow the imaginative Rhode Island example and found inadequate guarantees of political accountability in various collective bargaining acts and city charters. For example, in *Salt Lake City v. International Association of Firefighters*,[82] the Utah Supreme Court reasoned:

> [The Fire Fighters' Negotiation Act] authorizes the appointment of arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest.
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> The arbitrator/chairman of the panel is entrusted with the authority to decide major questions of public policy concerning the conditions of public employment, the levels and standards of public services and the allocation of public revenues. Those questions are legislative and political, not judicial or quasijudicial. The act is structured to insulate the arbitrator/chairman's decision from review in the political process. It is not intended that he be, nor is he in fact, accountable within the political process for his decision. This is not consonant with the constitutional exercise of political power in a representative democracy.[83]

High courts in Colorado,[84] Kentucky,[85] and South Dakota[86] offered similar

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79. City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 117, 256 A.2d 206, 211 (1969).

80. *Id.*

81. State v. City of Laramie, 437 P.2d 295, 300 (Wyo. 1968).

82. 563 P.2d 786 (Utah 1977).

83. *Id.* at 789.

84. *See* Greeley Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976). The Colorado Supreme Court expressly affirmed its reasoning in *Greeley* in City of Aurora v. Aurora Firefighters Protective Ass'n, 193 Colo. 437, 566 P.2d 1356 (1977).

85. *See* City of Covington v. Covington Lodge No. 1, 622 S.W.2d 221 (Ky. 1981).

explanations in invalidating the compulsory bargaining provisions before them.[87]

Rather than concentrate on whether the arbitrator is "public" or "private" in character, a number of authorities have foregone inquiries into political accountability in light of the realities of modern compulsory arbitration. The Minnesota Supreme Court recognized that utilizing an independent arbitrator may actually enhance collective bargaining proceedings, thereby justifying the legislature's attempt to work a compromise between direct electoral accountability and political independence:

> There is also a pragmatic reason for the legislature's removal of the arbitrators from the immediate pressures of public opinion. The arbitrators' position is inherently one of trust; the parties must feel confident that the panel will listen to their positions, weigh the evidence, consider the panel's statutory obligations, and come to a reasonable decision. The legislature may well have believed that exposing the arbitrators to more direct public input would influence the panels and undermine the effort to prevent work stoppages.[88]

The Oregon Court of Appeals noted that action discriminatory to the public will is unlikely since the arbitrator cannot have a personal interest in the proceedings and his decision must be tempered by the standards set forth in the enabling legislation.[89] Finally, Professor Westbrook argues that the primary concerns of the principle of political accountability may not be raised by the use of independent arbitrators because the legislature retains its control over fundamental policy decisions:

> Most decisions on the terms and conditions of employment do not involve truly fundamental issues. Issues that are important, but not fundamentally so, are whether one job classification is paid more than another, whether seniority or some other factor is determinative in filling certain vacancies or in deciding who will be laid off, and whether unit employees have the right to submit their grievances to binding arbitration. These are typical issues addressed in collective bargaining. Decisions on the allocation of total resources among

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86. *See* City of Sioux Falls v. Sioux Falls Fire Fighters, Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975).

87. State legislatures fearing hostile judicial review may find it advantageous to establish an arbitration agency, rather than rely on private arbitrators. For instance, the Nebraska state legislature created the Court of Industrial Relations -- a politically accountable administrative agency empowered to resolve bargaining impasses. *See* NEB. REV. STAT. §§ 48-801 to 838 (Supp. 1978).

88. City of Richfield v. Local 1215, Int'l Ass'n of Firefighters, 276 N.W.2d 42, 47 (Minn. 1979).

89. Medford Firefighters Ass'n, Local 1431 v. City of Medford, 40 Or. App. 519, 525-26, 595 P.2d 1268, 1272 (1979).

> various state and local programs involve fundamental issues, but the allocation of resources within particular programs and agencies, while important, involves less fundamental issues. In sum, a review of the statutes and experience in the various states indicates that it is highly unlikely that contract provisions dealing with fundamental policy issues will be included in collective bargaining contracts without significant legislative input.[90]

Accordingly, these authorities wisely advise against placing "public" or "private" labels on the arbitrator and instead recommend that courts seek political accountability in the form of a general protection against arbitrariness in the statutory scheme.[91]

IV. Do the Act's Provisions for Binding Arbitration Unconstitutionally Delegate Legislative Authority to the Arbitrator?

Viewed on the whole, the Act's provisions for binding arbitration, or "conciliation" as phrased in the Act, must be considered a constitutional delegation by the Ohio Legislature. As previously mentioned, binding arbitration is employed as a strike substitute for safety forces in Ohio and comes into being after repeated efforts at settlement between public employers and employees, including negotiation, mediation, and a fact-finding, have failed.[92]

The procedure by which the arbitrator[93] ("conciliator") is chosen to hear a given dispute is not as formal as the scheme used in Michigan,[94] although it does ensure that SERB will play an active role in the selection process. Upon request, SERB issues an order to proceed to conciliation and submits a registered list of five conciliators to the parties.[95] From that date, the parties have five days to select a conciliator by alternatively striking names from the registered list; if the parties cannot settle upon an individual, SERB must promptly appoint a conciliator from its registered list, or from lists

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90. Westbrook, *supra* note 5, at 375-76.

91. *See* Town of Arlington v. Bd. of Conciliation and Arbitration, 370 Mass. 769, 777, 352 N.E.2d 914, 920 (1976).

92. *See* notes 16-20 and accompanying text, *supra*.

93. More than one arbitrator may be used, as necessary. If so, the determination of the dispute must be by a majority vote. Ohio Rev. Code Ann. § 4117.14(G)(9) (Baldwin 1987).

94. *See* notes 53-57 and accompanying text, *supra*.

95. Ohio Rev. Code Ann. § 4117.14(D)(1) (Baldwin 1983). Ohio Admin. Code § 4117-9-06(B) (1987).

maintained by the American Arbitration Association.[96] The conciliator must be an Ohio resident.[97]

The conciliator must conduct a hearing within thirty days of SERB's order to arbitrate, or as soon as "practicable,"[98] although he may still make efforts at mediation.[99] At the hearing, the conciliator must abide by the rules promulgated by SERB and is granted supervisory powers comparable to those exercised by judges in courts of law.[100] Most importantly, the conciliator must maintain a written record that documents the statements made at the hearing and the report and recommendations of the fact-finder.[101] After the hearing, the conciliator must resolve the dispute by choosing, on an issue-by-issue basis, one of the parties' final offers.[102] This effectively limits the range of opinions the conciliator can issue and, arguably, encourages settlement.[103]

In addition to the foregoing procedural protections,[104] the arbitrator must consider the following factors in making his decision:

> (a) Past collectively bargained agreements, if any, between the parties;
> (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

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96. OHIO REV. CODE ANN. § 4117.14(D)(1) (Baldwin 1983).

97. OHIO REV. CODE ANN. § 4117.14(G)(13) (Baldwin 1983).

98. OHIO REV. CODE ANN. § 4117.14(G)(2) (Baldwin 1983).

99. OHIO REV. CODE ANN. § 4117.14(G)(1) (Baldwin 1983).

100. Pittner, DeTemple & Tremeti, *Public Employee Collective Bargaining and Ohio Public Employers: A New Perspective*, 17 U. TOL. L. REV. 719, 787 (1986).

101. OHIO REV. CODE ANN. § 4117.14(G)(6) (Baldwin 1983).

102. OHIO REV. CODE ANN. § 4117.14(G)(7) (Baldwin 1983).

103. *See* notes 64-65 and accompanying text, *supra*.

104. Rebecca White and her co-authors argue against the constitutionality of the Act, partly on the ground that the aforementioned protections "are but imperfectly included in Ohio's act." White, Kaplan & Hawkins, *supra* note 8, at 17. But "perfection" has never been required of binding arbitration legislation. *See* notes 27-31 and accompanying text, *supra*. This is especially true in Ohio, where courts retain a presumption in favor of constitutionality unless "overcome by proof, *beyond a reasonable doubt*. . . ." *Rocky IV*, 43 Ohio St. 3d 1, 10, 539 N.E.2d 103, 111 (1989). *See also* Medford Firefighters Ass'n, Local 1431 v. City of Medford, 40 Or. App. 519, 523, 595 P.2d 1268, 1271 (1979) ("The wisdom of the statutory policy is a matter for the legislature, not the courts.").

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.[105]

These standards ostensibly attempt to narrow the variables the conciliator can weigh in his mind and certainly impress upon him "intelligible principles" to guide his decision, as required of all legislative delegations in Ohio.[106]

The Act also makes adequate provisions for judicial review. By mandating written findings of fact and opinions, a sufficient record is provided to make court review meaningful. Section 2711 of the Ohio Revised Code governs the review of all conciliation orders, which begins in Ohio's lower tribunals -- the courts of common pleas.[107] Generally, the court is compelled to confirm the award, but it is empowered to modify the award in cases of obvious error and may vacate the arbitrator's order if elements such as fraud, corruption, partiality, or procedural misconduct are proven.[108] Hence, the Act incorporates well-recognized grounds for review[109] while simultaneously "promoting orderly and constructive relationships"[110] between the parties by discouraging interminable litigation.[111]

Although it is not completely clear that political accountability is constitutionally necessary in Ohio, the fact that conciliators are unlikely to confront fundamental policy concerns deprives the argument against constitutionality -- that unelected arbitrators are insufficiently accountable to the

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105. OHIO REV. CODE ANN. § 4117.14(G)(7) (Baldwin 1983).

106. *See* note 29 and accompanying text, *supra*.

107. OHIO REV. CODE ANN. § 4117.14(H) (*Baldwin* 1983).

108. Pittner, DeTemple & Tremeti, *supra* note 100, at 789-90 nn.366-69.

109. *See* notes 70-75 and accompanying text, *supra*.

110. OHIO REV. CODE ANN. § 4117.22 (Baldwin 1983).

111. *But see* White, Kaplan & Hawkins, *supra* note 8, at 17:

A party can seek to modify or to vacate the award, yet there exist serious statutory strictures on a court's power to disturb an arbitration award. Such limited review is tantamount to virtually no review, as the case law teaches that courts have taken a 'hands off' approach to arbitration awards. (footnotes omitted).

general public -- of much of its force. Under the Act, the conciliator's jurisdiction over public sector labor disputes is essentially limited to the "mandatory subjects of bargaining."[112] Hence, the award the conciliator issues, which is reflected in the newly created bargaining agreement, must also respect those limitations. The conciliator will surely address important topics; yet, she is extremely unlikely to threaten the legislature's monopoly over fundamental policies.[113] The conciliation award will not specify how the state or local government should allocate its resources, nor will it delineate the means by which the legislature should raise the necessary revenues; these decisions remain in the legislative domain and are not subject to the arbitrator's whim. Moreover, the Act ensures that the public interest will remain a primary consideration by vesting the public employer (often a city or local government) with the continuing obligation either to settle its disputes, or to submit a reasonable final offer to the conciliator. Finally, Ohio's turbulent labor history[114] and the presumption of validity accorded to all Ohio legislation[115] also urge a finding of constitutionality.

V. Conclusion

Public sector bargaining statutes typically employ compulsory arbitration as a means to resolve negotiation impasses. Such schemes have experienced constitutional challenges in a significant number of states, primarily on the ground that the state legislature unconstitutionally delegated its authority to a politically unresponsive arbitrator. Nonetheless, most state supreme courts have found their statutes constitutionally sound and do not permit the so-called "nondelegation" doctrine to invalidate such legislation.

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112. *See* note 13 and accompanying text, *supra*.

113. *See* note 88 and accompanying text, *supra*.

114. In 1972, Ohio was tied for fourth place in the nation in the number of strikes by safety forces. By 1973, Ohio had moved up to second place. There were six strikes by police and firefighters in this state in 1975, again placing Ohio second in the nation in the frequency of such strikes. The next year, 1976, saw the number of safety forces strikes increase by half, to nine. That year, Ohio gained the dubious distinction of ranking first in the nation, a position which we [the state of Ohio] retained for three of the following four years. In 1980, Ohio experienced *fifteen* strikes by safety forces, involving 2,300 workers and costing 6,800 lost workdays.

Rocky IV, 43 Ohio St. 3d 1, 19-20 n.16, 539 N.E.2d 103, 118-19 n.16 (1989) (citing Bureau of Labor Statistics, U.S. Dept. of Labor, Work Stoppages in Government, 1972-1980, (BLSR 434, 437, 453, 483, 532, 554, 582, 629, and Bulletin No. 2110, 1980) (emphasis in original).

115. *See* note 104, *supra*.

Based on these holdings and the arguments of several commentators, the binding arbitration arrangement in Ohio's Public Employees' Collective Bargaining Act emerges as a reasonable attempt to resolve bargaining impasses involving safety forces. The Act provides a number of factors to guide the arbitrator's opinion, a host of procedural safeguards (including judicial review) to guard against arbitrary action, and an overall scheme designed to prevent the conciliator from addressing fundamental policy issues. These considerations strongly support Justice Douglas' conclusion in *Rocky IV* that the "binding mandate provided in R.C. 4117.14(I) is not an unlawful delegation of legislative authority . . . ."[116]

By selecting binding arbitration as a means to resolve certain public sector negotiation impasses, the Ohio Legislature made a conscious decision to abandon a long-standing labor relations policy which had failed to answer to the needs of public employees and the general public. Professor Straudohar appropriately reminds us that such necessary, but reasonable, innovations should not be impeded by ancient constitutional doctrine:

> As a theoretical shibboleth designed to preserve the status quo, [the nondelegation doctrine] appears to be out of touch with contemporary notions of operational flexibility. Government is charged with the responsibility of providing services in a fast-changing environment. Demise of unwarranted legal fictions is necessary in labor relations so that service to the public in essential areas can function without interruption.[117]

Louis S. Cataland

116. *Rocky IV*, 43 Ohio St. 3d 1, 20, 539 N.E.2d 103, 119 (1989).

117. Staudohar, *supra* note 5, at 676.

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